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Hearing

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 KEVIN MARTINEZ RIVERA, ET AL.,

4 Plaintiffs,

5 v.

11 CV 2567 (NRB)

6 400 RESTAURANT GROUP CORP., ET  
7 AL.,

8 Defendants.

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9 New York, N.Y.

10 July 18, 2012

11:40 a.m.

11 Before:

12 HON. NAOMI REICE BUCHWALD,

13 District Judge

14 APPEARANCES

15 FITAPELLI & SCHAFFER, LLP

Attorneys for Plaintiffs Rivera, et al.

16 BY: BRIAN SCHAFFER

17 LITTLER MENDELSON

Attorneys for Defendants 400

18 BY: GEORGE PAUTA

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1 (Case called)

2 MR. SCHAFFER: Brian Schaffer.

3 Good morning.

4 MR. PAUTA: George Pauta, Littler Mendelson, for all  
5 defendants.

6 THE COURT: All right. Counsel, you are obviously  
7 asking me to approve the settlement that you've reached.

8 So, Mr. Schaffer, tell me why I ought to do so.

9 MR. SCHAFFER: Your Honor, we believe the settlement  
10 of \$375,000 for 13 plaintiffs that worked at two restaurants in  
11 Manhattan is a very fair and reasonable dispute. There were  
12 many disputed issues in this case. Plaintiffs and defendants  
13 were both represented by experienced counsel. We engaged arms  
14 length negotiations. We had defendants produce well over five  
15 thousand documents including all tip records, all payroll  
16 records, schedules.

17 We also had two very lengthy in-person settlement  
18 discussions between lawyers at my firm and lawyers of  
19 defendants' firm. We exchanged damages spreadsheets. My firm  
20 personally entered the data from every single paycheck that we  
21 received in spreadsheets. The spreadsheets were well over 50  
22 pages in length. After we exchanged these spreadsheets with  
23 defendants, defendants then sent us a five page document with  
24 their, essentially, objections to our numbers, their objections  
25 regarding the methodology of the calculations.

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1           We had disputes regarding how many hours the  
2 plaintiffs worked per shift. We said 10/11 hours. They said,  
3 approximately, eight or nine hours. There was a dispute  
4 whether defendants could claim entitlement to the federal tip  
5 credit. We said they could not claim the tip credit and my  
6 client should be paid full minimum wage. Defendants took the  
7 position that they should be paid the reduced minimum wage  
8 which was \$4.56 or \$5 an hour. Because of the dispute in the  
9 hours we allege that our clients were entitled to spread of  
10 hours because they worked over ten hours per shift. The  
11 defendant said there was really no spread because they worked  
12 under ten hours a shift.

13           We also had a fundamental agreement regarding the  
14 alleged tip misappropriation. We allege that there were people  
15 in the tip pool that did not customarily and regularly serve  
16 customers and therefore those people should not be tipped.  
17 Defendants took the position that their records showed that  
18 those individuals did not receive tips.

19           So there are all these disputes that we had amongst  
20 each other and we believe that the final resolution is a very  
21 substantial number. The average award per plaintiff is \$19,000  
22 which we believe is extraordinary in a restaurant case.

23           THE COURT: Could you recall interest me or estimate  
24 what the high number was that you said you were entitled to  
25 versus what they said the low number was that the defendants

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1 said was appropriate.

2 MR. SCHAFFER: The defendants in their calculations  
3 that they gave us in February of this year had a total of  
4 approximately \$157,000. In response to that we gave them our  
5 numbers which were approximately \$493,000. Out of that  
6 493,000, 256,000 of that were unpaid wages and the rest were  
7 federal liquidated damages, New York liquidated damages and New  
8 York statutory interests of nine percent. Disagreements that  
9 we had regarding liquidated damages was we were alleging the  
10 three year statute under the FLSA. Defendants contended there  
11 was a two year statute because we would not be able to prove  
12 willfulness.

13 Defendants also took the position that we wouldn't be  
14 able to collect federal liquidated damages and New York  
15 liquidated damages simultaneously. We believe in this district  
16 there is a split of authority as to that point. In addition  
17 the defendants alleged that we wouldn't be able to prove  
18 willfulness to even be entitled to New York liquidated damages  
19 in the first place. There is also dispute about whether we  
20 could recover nine percent statutory interest on top of and  
21 simultaneously with liquidated damages.

22 THE COURT: So the 493,000 dollar figure does that  
23 include this double liquidated damages and nine percent  
24 interest?

25 MR. SCHAFFER: Correct. The number that I

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1 presented --

2 THE COURT: And if you took out the nine percent  
3 interest and you took out double liquidated damages where would  
4 you get roughly?

5 MR. SCHAFFER: The wages only were 256,000 without the  
6 liquidated damages and penalties.

7 THE COURT: Okay. And if you had -- so one round of  
8 liquidated damages. In other words the 256 is -- let's call --  
9 it's a bad expression sort of like straight time. It's time  
10 and time and a half for overtime or the spread of hours?

11 MR. SCHAFFER: The 256 was using our assumptions for  
12 all of the unpaid wages --

13 THE COURT: Right.

14 MR. SCHAFFER: Without any liquidated damages added.

15 THE COURT: And if you added liquidated damages one  
16 time you double it or not?

17 MR. SCHAFFER: Well, it doesn't quite work like that.

18 THE COURT: Okay. So just tell me the 256 number,  
19 plus one level of liquidated damages called federal liquidated  
20 damages.

21 MR. SCHAFFER: Okay. On 256 the federal liquidated  
22 damages was 105,000.

23 THE COURT: So then your settlement amount exceeds  
24 that.

25 MR. SCHAFFER: Correct.

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1 THE COURT: I think under those circumstances -- I  
2 don't think I am sympathetic on the double liquidated damages.  
3 I don't think I am sympathetic on interests on top of  
4 liquidated damages. I haven't ever ruled on that but I can  
5 tell you what my sympathies or instincts are. Good news for  
6 defense.

7 All right. And for the 13 individuals the numbers are  
8 arrived at down to both dollars and cents. Is the -- other  
9 than the two named plaintiffs is that just in direct  
10 correlation to the proof of the hours that they worked?

11 MR. SCHAFFER: Exactly, your Honor. We took the final  
12 number, minus attorney's fees and costs and we allocated it per  
13 plaintiff based on the amount of damages that we believe they  
14 were owed in that \$493,000 spreadsheet. So we believe --

15 THE COURT: So wait a second. So, actually, something  
16 I said before is not quite accurate. The plaintiffs, the  
17 individuals are not getting 375,000. They're getting 375 minus  
18 128.

19 MR. SCHAFFER: Correct.

20 THE COURT: So they're getting nine thousand dollars  
21 less than the straight wage number?

22 MR. SCHAFFER: The number to the plaintiffs is  
23 247,000.

24 THE COURT: Right. Nine thousand dollars less than  
25 the 256.

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1 MR. SCHAFFER: Correct.

2 THE COURT: Why is that?

3 MR. SCHAFFER: Your Honor, that's a product of the  
4 vast disagreements that we had with defense counsel as to the  
5 methodology, the hours worked --

6 THE COURT: But this is a debate you could have with  
7 yourself, right? In other words, that could be between the law  
8 firm and your clients. In other words, you could take nine  
9 thousand dollars less out of your fee, right?

10 MR. SCHAFFER: The way we did it, your Honor, was we  
11 believe that we were not sure if we proceeded is if we would be  
12 able to recover all of that money because, for example, for the  
13 tip misappropriation category we were alleging \$80,000 in  
14 damages, defendants estimate was essentially zero. So that was  
15 an \$80,000 dispute. Regarding the minimum wage we were off by  
16 50 or \$60,000 additionally.

17 THE COURT: Right. But your firm took a fee of 34  
18 percent, right? Is my math right?

19 MR. SCHAFFER: Technically yes.

20 THE COURT: So, and the fee that you took did you have  
21 an agreement with your clients to take a certain percentage of  
22 the award?

23 MR. SCHAFFER: Yes. The agreement that we had with  
24 the clients is either one third, plus expenses or a negotiated  
25 or court awarded attorney's fee.

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1 THE COURT: So if you took a third it would be  
2 125,000.

3 MR. SCHAFFER: Correct. 125, plus we had,  
4 approximately, I believe it's \$1,288.85 expenses.

5 THE COURT: Well, I would personally be more  
6 comfortable giving you the third plus your expenses than having  
7 you take out of the recovery that your clients are going to get  
8 the 35 percent.

9 MR. SCHAFFER: We have no problem with that, your  
10 Honor.

11 THE COURT: Okay. Does defense counsel want to add  
12 anything?

13 MR. PAUTA: Not much, your Honor. Just I think  
14 Mr. Schaffer did a good job in accurately describing the case,  
15 the disputes between the parties and the way negotiations went.

16 Only just for purposes of the record, defendant of,  
17 course would, like to put on the record, one, that it admits no  
18 liability in terms of settling this matter that it entered the  
19 settlement agreement in order to avoid litigation costs and  
20 expenses and the risk involved

21 Secondly, the parties have entered into a written  
22 agreement which they've agreed to be bound by and that's it.  
23 Thank you.

24 THE COURT: All right. As modified, I approve the  
25 settlement and I'll expect to get an order from you consistent



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1 it with my prior advice. Thank you very much.

2 (Adjourned)

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